UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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CV-93-5904

In re Medical X-Ray Film
Antitrust Litigation

MEMORANDUM
AND ORDER

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This Document Relates To:
All Cases

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SIFTON, Chief Judge.

In these consolidated antitrust actions, plaintiffs allege that defendants Eastman Kodak Co., E.I. DuPont De Numours & Co., Miles, Inc. (a/k/a Agfa), and Fuji Medical Systems, U.S.A., Inc. have fixed the prices of medical x-ray and imaging during the years of 1989 to 1993. On December 10, 1997, I certified this case as a class action and gave preliminary approval for settlements with Fuji, DuPont, and Agfa. On March 9, 1998, I gave preliminary approval for a settlement with Kodak. Pursuant to these orders, notice of the proposed settlements was sent to the class and was also published in the *Wall Street Journal*. Plaintiffs have now moved for final approval of the settlements. Plaintiffs have also moved for an award of attorneys fees, reimbursement of expenses, and incentive payments to the class representatives. For the reasons stated below, the proposed settlement is approved, counsels' application for fees

and expenses is approved, and a special award to the named plaintiffs is approved.

BACKGROUND

The following facts are taken from the prior decisions in this case and plaintiffs' and plaintiffs' counsels' submissions in support of these motions.

History of the Litigation

On December 29-30, 1993, three class action complaints were filed, alleging that defendants combined and conspired, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, to fix, raise, maintain, and stabilize the prices of medical x-ray film in the United States. The complaints alleged that these violations commenced as early as 1988 and continued to December 31, 1993. In response to a request by plaintiffs, on March 11, 1994, a pre-trial order was issued to require defendants to preserve documents. A second pre-trial order was issued on September 6, 1994, consolidating these related cases for pre-trial purposes and established the organization of plaintiffs' counsel.

On February 23, 1994, defendants moved to dismiss the complaints on the grounds that they lacked specificity and failed to state a claim, pursuant to Rules 8, 9(b), and 12(b)(6). At a hearing, this court declined to dismiss the complaints but directed the plaintiffs to file amended complaints and directed the parties to depose the four pre-complaint witnesses. On April 11, 1994, plaintiffs filed amended complaints. Discovery ensued.

On June 14, 1994, defendants filed a renewed motion to dismiss. On June 22, 1994, plaintiffs filed their opposition to defendants' motion. Defendants subsequently filed an application for a protective order, and plaintiffs moved to compel defendants to respond to outstanding discovery requests. At a hearing on July 27, 1994, this court limited plaintiffs' discovery to depositions of certain supervisors and the production of documents authored or received by these supervisors. Further discovery disputes ensued and were referred to Magistrate Judge John Caden to resolve. On October 24, 1994, Magistrate Caden ruled that discovery was limited to the discovery directed by this court on July 27, 1994, and that only limited discovery could proceed. Plaintiffs' counsel thereafter took eight depositions.

On March 3, 1995, defendants filed a second renewed motion to dismiss, but the issue was not briefed until February 8, 1996. At oral argument on February 8, 1996, I determined to treat defendants' March 3, 1995 motion as a motion for summary judgment and set a further briefing schedule for the parties. By memorandum and order dated September 27, 1996, defendants' second renewed motion to dismiss was denied.

On November 4, and 14, 1996, defendants served responses and objections to plaintiffs' first set of interrogatories and request for production of documents. Further discovery and discovery related disputes ensued throughout the remainder of 1996 and throughout 1997, including document production from

third parties and twenty-five depositions. Plaintiffs' counsel proceeded to review, analyze, and code the document production received from defendants, involving over seven million pages of documents. In addition, plaintiffs' counsel arranged for analysis of defendants' transaction tapes and the discounted and undiscounted prices to distributors and end-users of medical x-ray film.

On September 30, 1997, plaintiffs filed a motion for certification of the class. During September and October 1997, settlement negotiations were proceeding, concluding in proposed settlements with defendants Fuji, Agfa, and DuPont, totaling $21,360,000. By memorandum and order dated December 10, 1997, I certified nationwide litigation and settlement classes and preliminarily approved the settlements with Fuji, Agfa, and DuPont and the forms of mail and publication notice.

The remaining non-settling defendant Kodak filed a motion to dismiss and compel arbitration of the claims of certain of its distributors on February 2, 1998. During January and February 1998, plaintiffs and Kodak engaged in settlement negotiations, concluding in an agreement to settle the claims against Kodak for $18,000,000 on February 12, 1998. On March 5, 1998, plaintiffs moved for preliminary approval of the Kodak settlement and for a revised order approving revised mail and publication notices covering the additional settlement with Kodak. On March 9, 1998, I issued the revised order, setting June 25, 1998, as the date for a hearing on final approval of the

settlements and application of plaintiffs' counsel for an award of attorneys fees and expenses and incentive payments to representative plaintiffs. In addition, I granted preliminary approval of the Kodak settlement. Pursuant to the March 9, 1998 order, mail notice was mailed on March 19, 1998, to members of the class, and publication notice was published on March 26, 1998, in the national edition of the *Wall Street Journal*.

The class notices provided a short summary of the litigation and the settlements, as well as a definition of the class. The notices informed class members of their right to opt out of the class and the procedures for doing so. The notices also stated that plaintiffs' counsel would be seeking fees, not to exceed one-third of the settlement fund, reimbursement of expenses, and incentive payments for the class representatives. The notices informed the class members that a hearing would be held on June 25, 1998, for the purpose of determining whether the proposed settlements are fair, reasonable, and adequate and to approve plaintiffs' counsel's application for fees, etc. Finally, the notices stated that any objections to the settlement and/or the applications for attorneys fees, expenses and payments to class representatives were to be filed by May 26, 1998.

No objections to the proposed settlements or plaintiffs' counsel's application for fees, expenses, and incentive payments were received, and only two class members have opted out of the proposed settlement. The proposed settlements

total $39,360,000 and have, since their deposit in late 1997 and early 1998, earned $700,000 in interest for the class.

DISCUSSION

The Proposed Settlements

Pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, a class action cannot be settled without the approval of the court. Nonetheless, "[t]he law favors settlements of class actions no less than of other cases." *In re Gulf Oil/Cities Service Tender Offer Litigation*, 142 F.R.D. 588, 590 (S.D.N.Y. 1992) (citing *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982)). "The central question raised by [a] proposed settlement of a class action is whether the compromise is fair, reasonable, and adequate." *Weinberger*, 698 F.2d at 73. In determining whether a proposed settlement meets this standard, the court's role is to "compare the terms of the compromise with the likely rewards of litigation." *In re Warner Communications Securities Litigation*, 618 F. Supp. 735, 741 (S.D.N.Y. 1985) (citations omitted). Courts in this circuit have evaluated proposed settlements using nine non-exhaustive factors, cited with approval in *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974):

> 1) the complexity, expense and likely duration of the litigation; 2) the reaction of the class to the settlement; 3) the stage of the proceedings and the amount of discovery completed; 4) the risks of establishing liability; 5) the risks of establishing damages; 6) the risks of maintaining the class action through the trial; 7) the ability of the defendants to withstand a greater judgment; 8) the range of reasonableness of the settlement fund in light of the

> best possible recovery; and 9) the range of reasonableness of the settlement fund to a possible recovery in light of all attendant risks of litigation.

Id. at 463 (internal citations omitted); *see also In re Gulf Oil*, 142 F.R.D. at 590 (applying *Grinnell* factors); *In re Warner Communications*, 618 F. Supp. at 740-741 (same). The court must also examine the negotiating process that gave rise to the settlement to determine if it was achieved through arms-length negotiations by counsel with the experience and ability to effectively represent the class' interests. *See id.* at 741.

1) The Complexity, Expense, and Likely Duration of Litigation

This five-year old action, involving antitrust claims against an oligopolistic industry, is legally and factually complex. While there has been extensive discovery, continued litigation would require significant amounts of time on the part of the litigants, with accompanying expense. Plaintiffs estimate that a trial, if held, would require at least a month, "with its attendant pretrial order, laborious winnowing of proof before trial, and post-trial skirmishing." *In re Gulf Oil*, 142 F.R.D. at 591. Accordingly, the complexity of this case as well as the probable duration and expense of further litigation favor approval of the proposed settlement.

2) Reaction of the Class to the Settlement

The reaction of the class to the settlement has been positive. No objections to the proposed settlement have been received, and plaintiffs' counsel state that they have received

calls from class members praising the results. Only two members of the class have chosen to opt out.

3) Stage of the Proceedings

The stage of the proceedings and the amount of discovery completed are important facts to consider in order to ensure that plaintiffs have had access to material to evaluate their case and assess the adequacy of any settlement proposal. *See In re PaineWebber Limited Partnerships Litigation*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997); *Chatelain v. Prudential-Bache Sec., Inc.*, 805 F. Supp. 209, 213-214 (S.D.N.Y. 1992).

In the case at hand, substantial discovery has taken place, and settlement was not reached until plaintiffs had survived a motion to dismiss as well as a motion for summary judgment. In addition, plaintiffs' counsel conducted depositions of 36 present and former employees of defendants and third parties, inspected over seven million pages of documents, retained economists and computer experts to assist in trial preparation, and analyzed issues respecting liability and damages. Accordingly, it appears that plaintiffs' counsel had more than adequate information at their disposal to assess the strengths and weaknesses of their case prior to reaching settlement.

4) & 5) Risks of Establishing Liability & Damages

In assessing the adequacy of a settlement, a court must balance the benefits of a certain and immediate recovery against the inherent risks of litigation. *See In re PaineWebber*, 171

F.R.D. at 126. Here, if the case were to proceed to trial, plaintiffs would have the burden of proving that defendants conspired to fix prices. While plaintiffs contend that the burden could be met, meeting that burden would not be without difficulty. There has been no governmental proceeding to provide evidence or verdicts to ease the burden of proof. In addition, plaintiffs' counsel states that there was no "smoking gun" and that the bulk of their case would rely on circumstantial evidence and testimony from expert witnesses and hostile witnesses. Defendants have vigorously contested any conspiracy and have argued that any similarity between their prices is the normal results of an oligopolistic market. Defendants would most likely continue to assert these positions if this case were to proceed to trial, using expert testimony to suggest that the market for x-ray film made any such conspiracy unlikely if not impossible. Defendants would also argue that information on pricing was sought for competitive purposes and not to fix prices.

As a result, the trial might well result in a "battle of the experts," and there can be "no guarantee of what the jury will conclude." *In re PaineWebber*, 171 F.R.D. 128. In light of the potential risks specific to this action as well as those inherent in any litigation, the class would face substantial risks of establishing liability should this litigation go to trial.

In addition, in order to prevail, plaintiffs must prove not only the existence of a conspiracy to fix prices but that the

conspiracy damaged class members. The complexities of proving and calculating damages "increase geometrically" in class actions. *Chatelain*, 805 F. supp. at 214 (citation omitted). In this case, proving damages is complicated by the marketing tactics employed by defendants, which involved rebates to defendants' distributors that varied depending upon the type and size of the end-user. While defendants' list prices increased each year during the alleged conspiracy, defendants could argue that the net prices, subtracting all rebates and other discounts, did not rise. Plaintiffs would have argued vigorously against such a conclusion, but damages are a matter for the jury to decide and "whose determinations can never be predicted with certainty." *In re PaineWebber*, 171 F.R.D. at 129.

Accordingly, the risks of establishing liability and damages weigh in favor of approving the proposed settlement.

6) Risks of Maintaining the Class Through Trial

This class was certified in December 1997. This certification has not been directly challenged. Nevertheless, prior to reaching a settlement agreement, defendant Kodak had made a motion to dismiss and compel arbitration of the claims of certain class members. This motion was withdrawn upon settlement, but it did create a risk to the class and to the potential recovery of the class. In any event, in the absence of settlement, there is no guarantee that defendants will not challenge the maintenance of the class as certified.

7) Ability of Defendants to Withstand Greater Judgment

No argument or evidence has been submitted to the Court regarding this factor. Accordingly, it neither supports nor defeats the proposed settlement.

8) & 9) Range of Reasonableness of Settlement Fund in Light of Best Possible Recovery and in Light of Attendant Risks of Litigation

"Fundamental to analyzing a settlement's fairness is 'the need to compare the terms of the compromise with the likely rewards of litigation.'" *In re PaineWebber*, 171 F.R.D. at 129 (quoting *Weinberger*, 698 F.2d at 73). In their affidavit in support of this motion, plaintiffs' counsel aver that the best possible recovery, assuming a jury would find liability and all damages questions in favor of plaintiff, is roughly $232 million, based on their experts' calculations. The proposed settlement of $39,360,000 is approximately 17% of the estimated "best possible" recovery.

The determination of whether a proposed settlement is reasonable "is not susceptible of a mathematical equation yielding a particularized sum." *In re Michael Milken Sec. Litig.*, 150 F.R.D. 57, 66 (S.D.N.Y. 1993) (citation omitted). In addition, the adequacy of the amount offered must be judged "not in comparison with the best possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of the plaintiff[s'] case." *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 762 (E.D.N.Y. 1984). "The fact that a proposed settlement may only amount to a fraction of the

potential recovery does not, in and of itself, mean that the proposed settlement is grossly inadequate and should be disapproved." *Grinnell*, 495 F.2d at 455.

This court has previously approved settlements that represent a far smaller percentage of the best possible recovery than that proposed here. *See, e.g., Cagan v. Anchor Savings Bank FSB*, [1990 Transfer binder] Fed. Sec. L. Rep. (CCH) ¶ 95,324 (E.D.N.Y. 1990) (approving settlement for $2.3 million out of best possible recovery of $121 – less than 2%); *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320 (E.D.N.Y. 1993) (approving settlement of 6.4-11% of potential recovery).

Accordingly, I find that the amount of the settlement here, $39,360,000, is substantial and, in light of the risks of litigation discussed above, within the range of reasonableness.

10) Arms-Length Negotiations

Review of the proceedings in this case makes evident that this settlement was reached through arms-length negotiations by experienced counsel on both sides of the case. The process resulted in a fair settlement, and "[i]t is not for this Court to substitute its judgment as to a proper settlement for that of such competent counsel in view of the fairness of the settlement to the class members." *In re Warner Communications*, 618 F. Supp. at 746.

In sum, under the circumstances of this case, I find that the settlement proposal is fair and merits approval.

Approval of Attorneys Fees and Expenses and Incentive Payments to Class Representatives

Plaintiffs' class counsel move for an order awarding attorneys fees for services rendered and for reimbursement of expenses as well as incentive payments for the three class representatives. Plaintiffs' counsel seek $13,120,000, or one-third of the settlement fund, and reimbursement of $1,144,413.70 for expenses. In addition, plaintiffs' counsel seek incentive payments of $3,000 for each of the three class representatives, totaling $9,000. The sum of these fees, expenses, and payments are to be taken from the settlement fund.

The class notice, mailed on March 19, 1998, specified that attorneys fees and reimbursement of expenses would be sought. The notice specified that the fees sought would not exceed one-third of the settlement fund. The notice also stated that plaintiffs' counsel would seek a payment to the class representatives for their services for the class. Finally, the notice specified that the sum of the above, if approved by the court, would be paid from the settlement fund. No objections to the request for fees or payments have been received.[1/]

In evaluating the propriety of applications for attorneys fees and expenses, courts in the Second Circuit and elsewhere have followed two approaches: lodestar analysis and a

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[1/] An investigator working on behalf of plaintiffs' counsel, Michael Melloy, submitted a letter dated May 22, 1998, regarding a dispute over fees between investigators and class counsel and seeking additional fees on the investigator's behalf. In a letter dated June 12, 1998, however, this request was withdrawn. Accordingly, the issues raised in the May 22, 1998 letter are not discussed here.

percentage-of-recovery analysis. *Compare In re Warner Communications*, 618 F. Supp. at 746-750 *with In re Gulf Oil*, 142 F.R.D. at 596-97. As noted in *In re Crazy Eddie Securities Litigation*, 824 F. Supp. at 325-26, while the Second Circuit rejected the percentage of recovery method in *Grinnell*, 495 F.2d at 471, in 1974, this approach gained favor in the late 1980's.[2/] This favoring of the percentage of recovery method was crystalized by the adoption in December 1991 of the Eastern District of New York "Civil Justice Expense and Delay Reduction Plan," which provides that, in common fund cases, such as this case, attorneys fees shall be based on a percentage of recovery. *See In re Crazy Eddie*, 824 F. Supp. at 326. Under the Eastern District plan, the attorneys must submit time records, as is required under the lodestar approach, which are used as a guideline in setting the percentage recovery. *Id.* Although this plan expired at the end of 1997, it is nonetheless instructive.[3/] In any event, plaintiffs' counsel argue that the amount sought is reasonable under either approach.

[2/] This trend towards a percentage-of-recovery approach followed the Supreme Court's noting in dicta in *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), that under the common fund doctrine a reasonable fee is based on a percentage of the fund bestowed on the class.

[3/] In addition, I note that courts in other circuits have recently authorized the use of the percentage approach in awarded fees in common fund cases. *See, e.g., In re Thirteen Appeals Arising Out of the San Juan DuPont Plaza Hotel Fire Litig.*, 56 F.3d 295, 305 (1st Cir. 1995); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821-22 (3d Cir. 1995); *Gottlieb v. Barry*, 43 F.3d 474, 487 (10th Cir. 1994); *Florin v. Nationsbank of GA, N.A.*, 34 F.3d 560, 564-66 (7th Cir. 1994).

Under the percentage approach, there is no general rule as to what percentage of a common fund may reasonably be awarded as attorneys fees. Some courts have adopted 25% as a bench mark, which may be adjusted in light of factors such as efforts expended by class counsel, the risk assumed by class counsel, the result obtained, the value of other benefits to the class, and the absence of objections by class members. *See In re Crazy Eddie*, 824 F. Supp. at 326.

Here, the fees sought represent one-third or 33.33% of the proposed settlement fund. This request appears reasonable and is well within the range accepted by courts in this circuit. *See, e.g., In re PaineWebber Sec. Litig.*, Nos. 86-6776, 89-2838, 1994 U.S. Dist. LEXIS 10873 (S.D.N.Y. Aug. 5, 1994) (33 ⅓%); *In re Crazy Eddie*, 824 F. Supp. at 326 (33.8%).

The seventeen firms representing the class spent a total of over 30,000 attorney and paralegal hours, for which they have calculated a lodestar of $7,856,330.70. Class counsel made this investment of time without the certainty of compensation and spent several years defeating motions to dismiss and conducting discovery to enable them to adequately assess settlement offers. These efforts culminated in the current fund of $39,360,000 for the class, which has been earning interest since early this year. Finally, no one has objected to the fee.

Similarly, using the lodestar method, the requested fee appears reasonable. Class counsel have calculated their lodestar as $7,856,330.70. This figure is, however, "simply the beginning

the class, which has been earning interest since early this year. Finally, no one has objected to the fee.

Similarly, using the lodestar method, the requested fee appears reasonable. Class counsel have calculated their lodestar as $7,856,330.70. This figure is, however, "simply the beginning of the analysis. *In re Warner Communications*, 618 F. Supp. at 747. In analyzing the total amount requested, a court considers 1) the time and labor expended by counsel; 2) the magnitude and complexity of the litigation; 3) the risk of the litigation; 4) the quality of representation; 5) the amount of the fee in relation to the settlement; and 6) public policy considerations. *See id.* These considerations are used to determine the reasonableness of a multiplier which is applied to the lodestar calculation to arrive at the total amount of fees. *See id.* at 749. Class counsels' requested fee would apply a multiplier of 1.67 to this amount to arrive at their requested fee of 13,120,000. This multiplier is at the low end of multipliers used in other cases. *Id.* (listing cases).

Here, class counsel have provided affidavits detailing their work over the history of the case as well as breakdowns of the number of hours performed by each firm involved. Review of these affidavits indicates that counsels' calculation of the lodestar total is reasonable based on the attorneys' historical billing rates.

The complexity and risk involved in this litigation have previously been discussed. "Numerous cases have recognized

that the attorneys' contingent fee risk is an important factor in determining the fee award." *Id.* at 747 (citing *Grinnell*, 495 F.2d at 470). In addition, class counsel did not have the benefit of a prior government litigation or investigation. "[T]his is not a case where plaintiffs' counsel can be seen as jackals to the government's lion, arriving on the scene after some enforcement or administrative agency has made the kill." *In re Gulf Oil*, 142 F.R.D. at 597.

The quality of class counsel, as seen by this court during the course of this litigation, has been high and is reflected in the settlements reached. In addition, plaintiffs' counsel confronted defense counsel from highly respected law firms that raised several challenges to the merits of this case.

As discussed above, the requested fee is reasonable in relation to the size of the settlement, amounting to one-third of the settlement fund. Finally, an adequate award furthers the public policy of encouraging private lawsuits in protecting against restraint of trade. Accordingly, I find the fees requested by class counsel reasonable, and the requested award of $13,120,000 is approved.

Plaintiffs' counsel have provided affidavits detailing the expenses incurred by them in the pursuit of this case, totaling $1,144,413.70. In light of the length and complexity of this litigation, this amount is not unreasonable and should be awarded. *See, e.g., Golden v. Shulman*, No. 85-3624, 1988 WL 144718 at *8 (E.D.N.Y. Sept. 30, 1988).

Plaintiffs' counsel also seek an additional payment of $3,000 to each of the three named plaintiffs, Victoria Orthopedic, Midwest X-ray, and IMCO. These plaintiffs have devoted substantial time to the pursuit of this lengthy case, including reviewing successive pleadings and responding to written discovery requests. Two of the named defendants, Midwest X-ray and Victoria Orthopedic, also had employees deposed by defendant.[4/] "Courts have recognized that name plaintiffs may be regarded for taking on extra responsibilities of this sort." *Id.* (citations omitted). Accordingly, a special award of $3,000 to each named plaintiff is approved.

CONCLUSION

For the reasons stated above, this court finds that proposed settlement of $39,360,000, already deposited in a common fund, is approved. The fund is to be divided in accordance with the stipulation of settlement. Counsels' application for fees and expenses is approved. Finally, named plaintiffs Victoria Orthopedic, Midwest X-ray, and IMCO's special award of $3,000 each is approved.

[4/] The deposition of an IMCO employee was scheduled for February 17, 1998, but was canceled following settlement with Kodak.

The Clerk of the Court is directed to furnish a filed copy of the within to the magistrate judge and to plaintiffs' lead counsel, who is directed to make distribution forthwith to all appropriate parties.

SO ORDERED.

Dated : Brooklyn, New York
August 7, 1998

United States District Judge